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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. [redacted]111

CHICAGO GREAT WESTERN RAILROAD COMPANY,
Plaintiff in Error,

vs.

L. W. BASHAM, Administrator of the Estate of John J. Spellman, Deceased, *Defendant in Error*.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

GEO. H. CARR,
FRED P. CARR,
DONALD EVANS,
O. M. BROCKETT,
Attorneys for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 901

CHICAGO GREAT WESTERN RAILROAD COMPANY,
Plaintiff in Error,

vs.

L. W. BASHAM, Administrator of the Estate of John J. Spellman, Deceased, *Defendant in Error.*

REPLY TO BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR

Thru an inadvertence, the Brief and Argument for plaintiff in error in this case carried the number "910", instead of "901", which is the true number as given by the Transcript of Record. Our attention was called to the inadvertence by the Clerk, and it is our understanding that our Brief was given the correct number of the case by him.

On the 26th day of November, 1915, the Supreme Court of Iowa filed their opinion herein affirming the judgment of the District Court of Polk County, Iowa, in favor of the plaintiff, L. W. Basham, administrator of the estate of John J. Spellman, deceased. The opinion will be found set out in full beginning on page 77 of the Transcript of Record. A petition for rehearing having been submitted to the Supreme Court of Iowa by the Chicago Great Western Railroad Company, that court, on the 7th day of April, 1916, filed its supplemental opinion withdrawing the third paragraph of the opinion and substituting a new paragraph "dealing directly and solely with the point made by defendant, that the cause of action stated by the amended petition was barred by the statute of limitations". (Transc., page 92.) The supplemental opinion closed with the following language: "In

preparing this opinion for official publication, the reporter of this court will make the substitution of the third paragraph as above indicated. As thus modified, the opinion will stand, and the petition for rehearing is overruled." (Trans. p. 95.) Thereafter, the Railroad Company having submitted to the Supreme Court of Iowa a petition for rehearing of the supplemental opinion, the same was, on the 18th day of December, 1916, overruled. (Trans. p. 112, Stipulation 7 as to papers to be included in making up transcript.)

From the certificate of the clerk of the Supreme Court of Iowa, it appears that on the 26th day of November, 1915, that court filed a written opinion affirming the judgment of the District Court and ordering the issuance of a writ of procedendo. (Trans. p. 96.) It further appears from the certificate of said clerk that on the 7th day of April, 1916, the Supreme Court of Iowa filed their written opinion overruling the petition for rehearing and ordering the issuance of a writ of procedendo. (Trans. p. 96.) It further appears by the certificate of said Clerk that on the 18th day of December, 1916, appellant's second petition for rehearing, having been fully considered, was overruled. (Trans. p. 97.)

Counsel for defendant in error begin their Brief and Argument by criticism of our opening statement. It is said that it does not fairly or correctly state the issues as set forth in the pleadings. It is asserted that it appears from the averments of the petition that the decedent, John J. Spellman, at the time of his injury *was engaged in interstate commerce*, and that the right of recovery, if any, was under the Federal Employer's Liability Act.

The petition appears on pages 1 and 2 of the transcript. After alleging that the plaintiff brings the suit as administrator of the estate of John J. Spellman, deceased, it is alleged that defendant is a corporation engaged in owning and operating a railway thru the states of Iowa, Illinois, Missouri and Kansas; that deceased was an employe of the defendant railway company as an engineer, and that the engines on which he worked were used for drawing a regular passenger train running between Kansas City, Kansas, and Chicago, Illinois; that the run of said Spellman was between Des Moines and Oelwein. The negligence on which plaintiff relies for a recovery is then set out. It is then averred that on account of the death of said Spellman, *his estate* has suffered and sustained great damages, to wit, in the sum of $20,000.

The contention of counsel that "from the statements in the petition originally filed, the liability, if any, was to be determined by the Federal Employer's Act" is not in harmony with the record. On the contrary, it clearly appears from the recitals of the petition that the action was brought to recover under the general law or law of the State of Iowa, and not

under the Federal Employer's Act. Damages to the estate could not be recovered under the Federal Act. It was necessary to a well drawn petition under the general law to allege the business in which the defendant company was engaged; it was also essential to a well drawn petition to allege the capacity in which Spellman was employed by the defendant. There can, we think, be no doubt that if the Federal Employer's Liability Act had never been enacted, the petition would have contained the same allegations. But it is said that defendant demurred to the petition on the ground that it showed the action was brought under the Employer's Liability Act. The Iowa courts did not sustain the defendant in this position, thus holding that the petition pleaded a cause of action under the general law and not under the Act of Congress.

It is said:

> "The Supreme Court of Iowa did not hold that the cause of action as originally stated in the petition was brought under the state law, nor did it hold that there was a change from law to law by filing the amendment to the petition."

The supplemental opinion of the Iowa court does not sustain counsel in the view above expressed. The court held that the statute of limitations affords no defense in this case. This conclusion is bottomed upon the following considerations: The suit was originally brought and has ever since been maintained by the administrator, who is the proper party to prosecute it whether it be maintained under the law of the State or the Federal Employer's Liability Act; the cause of action in either case is the death of Spellman occasioned by the negligence of the defendant; whether the action be brought in one form or the other, it is by the same party, against the same party, in the same court, for damages for the same alleged wrong, the sole distinction being in the measure of damages to be recovered and the person or beneficiary to whom the plaintiff must account for the damages, if any, which he collects. It is then said:

> "Now assuming that plaintiff seeks to recover under the statutes of the State, and alleges a good cause of action, but before the case is brought for trial, or even pending the trial, it develops that the deceased was injured while engaged in interstate commerce and that to sustain a verdict in favor of the administrator, the petition should allege that he was survived by a dependent wife or family, an amendment to the petition adding such necessary averment does not, in the

judgment of this court, state a new cause of action permitting the defendant to successfully interpose a plea of the statute of limitations."

The court then proceeds in its attempt to justify the above stated conclusion of law by a review of the authorities.

Counsel's claim that the Iowa court, in the supplemental opinion, was deciding a mere "moot" question, and that it did not hold that the statute of limitations was not a good defense basing its conclusions upon the assumption stated in the opinion, is without merit.

It appears from the allegations of the petition that Spellman died on the 28th of March, 1910. The petition was filed on the 21st of April, 1911. On the 9th day of May, 1911, the defendant filed a demurrer, which was overruled on the 12th day of January, 1913. (Trans. pp. 1, 2 and 3.) On the 21st day of January, 1913, the defendant filed an answer putting in issue all of the allegations of the petition. (Trans. p. 3.) On the 13th of October, 1913, plaintiff filed an amendment to his petition setting up the fact that Spellman left him surviving a widow, and that he brought the action for her benefit. (Trans. p. 4.) On the 17th of October, 1913, the defendant filed a motion to strike the amendment from the files on the ground, among others, that it set up a new and independent cause of action and that the cause of action pleaded in the petition as amended was barred by the statute of limitations. (Trans. p. 4.) On Oct. 20th, 1913, the motion to strike having been overruled, defendant filed an amended and substituted answer to the petition as amended. Division I puts all the allegations of the petition as amended in issue; Division II pleads contributory negligence in mitigation; Division III pleads that the cause of action upon which plaintiff now seeks to recover was not set up or alleged until the filing of the amendment to plaintiff's petition on Oct. 13, 1913, and more than two years after the cause of action arose and is barred by the statute of limitations. (Trans. p. 5.) The case was tried on the issues thus formed, and at the close of the evidence, the plaintiff amended his petition as amended, alleging that Fannie L. Spellman, the surviving widow of John J. Spellman, suffered damages in the sum of $20,000 on account of his death; that plaintiff withdrew from his original petition the words " 'the plaintiff further states that on account of the death of said John J. Spellman, deceased, his estate has suffered and sustained great damages, to wit, in the sum of $20,000', the said words being merely the statement of an erroneous legal conclusion". It was agreed that the amended and substituted answer of the defendant should stand also to the petition as finally amended. (Trans. p. 5.)

Defendant in error cites *M. & St. L. vs. Winters*, 242 U. S.

353, in support of a number of propositions contained in the brief. That was a case in which the defendant in error sued to recover for personal injuries. The plaintiff alleged, and the defendant denied, that at the time of his injuries he was engaged in interstate commerce. It appears from the opinion that "at the trial, the defendant in no way saved its rights to deny that the parties were engaged in interstate commerce at the time of the accident, or to object to the application of the federal statute. On the contrary, without qualification, it invoked and relied upon the statute and the right that, because of the statute, it supposed itself to possess." It is concluded: "Therefore, even if the courts and parties were wrong about the proper basis for the suit, that fact does not entitle the defendant to have the judgment reversed. It can not complain of the course to which it assented below."

It will be observed that there is nothing in the record in this case which makes the doctrine of the *Winters* case applicable.

In the 21st division of the Brief for defendant in error it is said: "The transcript of the record in the case does not contain any assignment of errors, if any was made, on the appeal to the Supreme Court of Iowa from the trial court." Sec. 4136 of the Supplement to the Code of Iowa provides: "No assignment of errors shall be required in any case at law or in equity now pending or hereafter docketed in the Supreme Court." However, Division V of the opinion of the Iowa Supreme Court reads as follows:

> "Most of the assignments of error predicated upon instructions given and refused, when tested by the rules of law affirmed in this opinion, do not appear to have been well taken, and so far as any of them raise any questions than those construed and passed upon, we find the language used by the trial court is not open to the criticisms made against it." (Trans. p. 91.)

The Iowa court held that the question of the statute of limtations was sufficiently raised and decided it, and under the holdings of this court, the question must be deemed to have been presented with sufficient clearness to sustain a writ of error from this court to the state court. If the plaintiff in error on the trial of the case had failed to raise the objection that plaintiff's cause of action as stated in the petition as amended was barred by the two years' limitation period found in the federal act, or indeed, had gone farther, as the defendant did in the *Winters* case, and taken the affirmative position that the cause of action set up in the petition as amended was not barred, we should then have a case for the application of the doctrine of the *Winters* case. But what

are the facts? We first have the motion to strike the amendment on the ground that it set up a new cause of action and was barred by the two years' limitation period. In the amended and substituted answer, the defense was specifically pleaded. At the conclusion of the plaintiff's testimony, defendant moved the court to direct the jury to return a verdict in its favor on several grounds, including the following:

> "4. The cause of action presented by plaintiff's petion as amended is barred by the statute of limitations.
> 5. It appears from the undisputed evidence that Mr. Spellman, plaintiff's decedent, died in March, 1910, and more than two years prior to the filing of the amendment to the petition setting up the cause of action now set up by the petition as amended." (Trans. p. 13.)

At the close of all the evidence, defendant filed a motion to direct a verdict in its favor on the following grounds, among others:

> "5. The cause of action set up in plaintiff's petition as amended is barred by the statute of limitations". (Trans. p. 42.)

After the evidence was concluded and before argument of counsel to the jury, the defendant asked the court to give to the jury the following instruction:

> "2. The court instructs you that the cause of action set up by the plaintiff in his petition as amended is barred by the statute of limitations, and your verdict must therefore be for the defendant." (Trans. p. 42.)

The defendant excepted to the refusal of the court to give to the jury requested instruction #2 on the following ground:

> "The undisputed evidence in this case shows that the cause of action set up in plaintiff's petition as amended is barred by the statute of limitations. The undisputed evidence shows that John J. Spellman died on Mar. 29, 1910, and the cause of action set up in the petition as amended was not pleaded, nor was suit brought thereon until more than three years after the cause of action arose." (Trans. p. 44.)

Within the time fixed by law, the defendant filed a motion to set aside the verdict and grant a new trial, one ground of which was the refusal of the court to give Instruction #2

asked by defendant, being the instruction asked on the subject of the statute of limitations.

It thus appears from the record that the defendant, at every stage of the trial where the question could possibly be raised, insisted upon the statute of limitations, and it surely cannot be said that the plaintiff in error did not save its right to invoke the defense.

For the apparent purpose of weakening the defendant's testimony, in defendant in error's brief, page 21, it is said that "the railroad company did not call any member of the night switching crew to testify." Again on page 17, it is said: "No member of the night switching crew was called or testified for the railroad company, but some of the members of the four day switching crews testified."

The assertion that there were four day crews in addition to a night crew is not correct. There were but four crews in all, and one member of each crew testified. Mr. Linney was foreman of one of the four crews, and testified. (Trans. p. 22.) Mr. Becker was foreman of another of the four crews and testified that on the day of the accident he was foreman of a switching gang; that he was not a member of the gang Mr. Linney was foreman of; that there were four gangs in all in the yards at Oelwein; that Mr. Linney was foreman of one, he (Becker) of another, Mr. Plashal of another and Mr. Reese of the fourth; that Mr. Gibbons was a switchman and at the time was working with Mr. Reese. (Trans. p. 23.) Mr. Plashal was foreman of one of the gangs and testified. (Trans. p. 24.) Mr. Gibbons, who at the time of the accident, was a member of Mr. Reese' crew, testified. (Trans. pp. 26 and 27.) The evidence that none of the switching crews left the switch displaced prior to the accident is full and complete, and the claim that there was still another switching crew, known as the night crew, no member of which crew was called as a witness for the railroad company, is untrue.

On page 18 of the Brief and Argument for defendant in error it is said:

> "There is no claim that any of these keys to this lock were lost or in the possession of others than the switchmen and trainmen or the section foreman."

Mr. Sheriff, who was in the employ of the railroad company in 1902 to 1907 as a machinst, and who now lives at Waterloo, testified that when he was working for the company in the shops, he knew who were supplied with keys to the switches, and that he had them thrown to him several times; that the trainmen, the switchmen, the sectionmen, the hostlers had keys when he worked there. (Trans. p. 9.) Mr. Vermillion, Superintendent for the Company in 1910 testi-

fied that the switchmen, who had occasion to open and handle the switches, the engineers, the various trainmen and trackmen, firemen and sectionmen had keys; that the same key would unlock all the switches standard lock and standard keys. (Trans. pp. 18 and 19.)

Counsel's claim that no one except switchmen, trainmen and section foremen could have had a key to the lock is without force in the light of the record, showing that for years before the accident occurred, the keys had been distributed freely among the employes of the company and no regulation requiring that they be returned to any custodian.

On page 19 of the Brief it is said:

> "There was a claim made that the lock could be opened without a key, by jerking on a chain, but there is no testimony showing or tending to show that with the chain anchored to the switchstand, as shown in the photograph Exhibit C on page 3 of the Transcript, the lock could have been opened by jerking on the chain."

J. L. Ervin, special agent of the Railroad Company, testified that he was in Oelwein at the time of the accident; that he examined the switch stand and noticed the padlock hanging on the stand unlocked; that there was a spike lying there, which he took charge of, and that there were marks on it as if it had been hammered; that at that time the marks were fresh; that the lock could be unlocked without a key. (Trans. p. 32.) On cross examination he further testified:

> "I said the lock could be opened in another way; it could be jerked open with a chain; I think it could, I don't recall seeing the men do it that way, but I could do it that way; I have seen it done; I have unlocked that one, did it shortly after the accident; in opening that lock with a chain, I don't think I experimented with any other lock; I say that by putting this ring thru something solid, the lock can be jerked open, and that I did that. This lock on this switchstand on the day this wreck occurred was in such condition that when placed in the hasp and locked, by pulling on the chain you could unlock it. I could not tell how long it had been in that condition; don't know how long it had been there."

The statement that there is no testimony that with the chain anchored to the switchstand as shown in the photograph Exhibit C, the lock could have been opened by jerking on the chain, we submit is a mere quibble.

On page 20 of his Brief, counsel calls attention to the instruction of the court, in which he told the jury that

> "The fact that an accident may have happened and the deceased sustained an injury from which his death resulted at or about the time and place alleged in the petition of plaintiff does not establish the fact of negligence, nor does it raise a presumption that the defendant was negligent, for negligence must be proven.
>
> The business of running a railway engine is a hazardous one, and the employe who enters upon such employment assumes the ordinary risks and hazards indental to such employment.
>
> The defendant is not an insurer of the safety of its employes. It is only liable when it is shown to have been guilty of one or more of the acts of negligence charged, and when it is further shown that such acts of negligence were the proximate cause of the injury, and because thereof, the widow has sustained damages." (Trans. pp. 51 and 52.)

As counsel points out, the law of the case as announced by the trial court is that the negligence charged must be proven, and the fact that an accident happened raises no presumption of negligence on the part of the defendant; that Spellman, by entering the employment of the defendant, had assumed the ordinary risks and hazards incident to such employment. and that defendant could only be held liable when it is shown that it had been guilty of one or more of the acts of negligence charged in the petition. Having called attention to the law of the case as laid down by the trial court, the statement made on page 26 of the brief that "none of the cases cited (in plaintiff in error's brief) are applicable to the case at bar", seems a remarkable one.

In *Patton vs. Tex. & Pac. Ry.*, Mr. Justice Brewer points out very clearly the distinction between the case of a passenger, where the doctrine of *res ipsa loquitor* does apply, and the case of an employe, where it does not apply. From the opinion we quote:

> "That, while in the case of a passenger, the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely, * * * a different rule obtains as to an employe. The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirm-

ative fact for the injured employe to establish that the employer has been guilty of negligence. *Texas & Pac. Ry. Co. vs. Barrett*, 166 U. S. 617, 17 S. C. R., 707. That in the latter case, it is not sufficient for the employe to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was."

In *Nor. Pac. vs. Dixon*, 139 Federal, 737, 71 C. C. A., 555, decided by the Circuit Court of Appeals of the Eighth Circuit in 1905, it is said:

> "But the doctrine, *res ipsa loquitor*, is inapplicable to cases between master and servant brought to recover damages for negligence, because there are many possible causes of accidents during service, the risk of some of which, such as the negligence of fellow servants and the other ordinary dangers of the work, the servant assumes."

In *Cryder vs. C., R. I. & P.*, 152 Federal, 417, Mr. Justice Sanborn points out that the doctrine, *res ipsa loquitor*, is inapplicable to cases between master and servant, and gives the reason for it in the following language:

> "The servant assumes the ordinary risks and dangers of his employment which are known to him and those which would be obvious to one of ordinary prudence in similar circumstances. One of these risks is that which arises from latent defects, which the ordinary care of the master may not discover, in the place, articles, and machinery with which the servant works. The failure of the master to find and remove such latent defects, which ordinary care is unable to discover, constitutes no negligence on his part, because the limit of his duty is to exercise reasonable care, and the discovery and repair of such defects falls without that limit."

The reason, then, for the well settled rule of this and other Federal courts, for holding that the doctrine, *res ipsa loquitor*, does not apply in cases between master and servant, grows out of the fact that the servant assumes the ordinary risks of his employment and the application of the doctrine to cases between master and servant would be destructive of that principle.

On page 29 of his Brief, counsel asserts that "the rule that the doctrine of *res ipsa loquitor* does not apply to actions by servants has no application under the Federal Employers Act, which abolished the fellow servant rule." The cases

cited do not sustain the statement made. In the case of *So. Ry. Co. vs. Derr*, the plaintiff, who had brought an action for damages for personal injuries, was not permitted to recover. In the course of the opinion it is said:

> "Passenger actions involve a duty to exercise a very high degree of care, amounting almost to insurance, and the instances where the accident does not depend upon some negligence of the railroad or of some employe are so rare that a general rule may well rest upon the general fact. In an employe's action, the defendant's obligation is only to use ordinary or due care to provide a safe place to work or proper instrumentalities and methods, and it must be admitted that an unknown, but considerable, fraction of the injuries to employes are either true accidents or assumptions or risk, or are proximately caused only by plaintiff's carelessness; hence there is, in truth, no such common and dominant probability of negligence as in the passenger cases."

In *Ridge vs. Norfolk So. Ry. Co.*, 83 S. E. 762, it is held that an employe suing for a personal injury, must, to recover, produce evidence from which the jury may reasonably and properly infer actionable negligence.

Respectfully submitted,

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